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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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JASON RAMJATTANSINGH,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM COUNTY COURT AT LAW NO. 8
OF HARRIS COUNTY, TEXAS

AND ON DISCRETIONARY REVIEW
FROM THE FIRST JUDICIAL DISTRICT AT HOUSTON

APPELLANT'S REPLY BRIEF ON STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT PERMITTED

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 38.1(a), a list of names and addresses of all interested parties is provided below so the members of this Honorable Court may determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

Complainant:
the State of Texas

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Trial Judge:
Honorable Shelly Hancock
Retired Judge
County Court at Law No. 8
Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

The Court has permitted oral argument in this matter.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant adopts the court of appeals' recitation of the statement of the case and procedural history.[1]

APPELLANT'S REPLY TO THE STATE'S GROUNDS FOR REVIEW

1. The First Court of Appeals correctly held that the State's conscious decision to deliberately increase its burden of proof at trial as a matter of office policy estops it from arguing on appeal that the sufficiency of the evidence must be measured under a hypothetically correct jury charge.

2. The First Court of Appeals correctly held that the evidence was legally insufficient to prove beyond a reasonable doubt that Appellant's breath-alcohol content at the time of this offense was .15 or greater as alleged in the information and mandated by the jury charge.

SUMMARY OF THE ARGUMENT

1. The State's conscious decision at trial to deliberately increase its burden of proof by adding the non-statutory phrase "at or near the time of the offense" as a matter of office policy in effect at the time of this trial

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[1] Appellant challenges all factual assertions made in the State's merits brief, and adopts the court of appeals' factual statement. *Ramjattansingh v. State*, 530 S.W.3d 259 (Tex.App.– Houston [1st Dist.] 2017, pet. grt'd). "Brf." refers to the State's merits brief; "Pet." refers to its petition for discretionary review; "SB" refers to its brief in the court of appeals; "Reply" to Appellant's Reply to the State's petition. This reply brief must be filed on or before January 2, 2018.

forecloses it from arguing on appeal that the hypothetically-correct jury charge would not include that allegation. The court of appeals correctly held that the doctrine of invited error prohibits the State from complaining of an outcome driven by an error it created. Because this Court can properly take judicial notice of the court of appeals' decision in *Meza* that it was the official office policy of the Harris County District Attorney's Office to assume this higher burden, the State's claim that this Court must ignore *Meza* is unavailing.

2. The First Court of Appeals did not sit as a thirteenth juror when it correctly held that the evidence was legally insufficient to prove beyond a reasonable doubt that Appellant's breath-alcohol content was at least .15 at or near the time of this offense as alleged. The State's ground impermissibly truncates the standard of review and fails to recognize that jury verdicts are not insulated from meaningful sufficiency challenges on appeal. The State's argument ignores *Meza,* in which the court entered an appellate acquittal because the breath test taken 90 minutes after the arrest is not "at or near the time" of the arrest. By contrast, the interval between the arrest and the test in the case at bar is two hours.

APPELLANT'S REPLY TO THE STATE'S FIRST GROUND

"Pay no attention to that man behind the curtain!"
THE WIZARD OF OZ (Metro-Goldwyn-Mayer)(1939).

The Official Policy of the Harris County District Attorney's Office in Meza Sets the Stage for the Court of Appeals' Reversal and Acquittal

On March 6, 2015, Danilo De Jesus Meza was arrested for the Class A misdemeanor offense of driving while intoxicated while having a blood alcohol content ["BAC"] of at least .15. *Meza v. State*, 497 S.W.3d 574, 575 (Tex.App.– Houston [1st Dist.] 2016, no pet.). The information alleged that Meza's BAC was at least .15, at or near the time of both the breath test and his arrest. *Id.* at 579-80. At his trial in October 2015, Meza moved for a directed verdict based on the State's lack of any evidence of his BAC being .15 or more, at or near the time of the commission of the offense. *Id.* at 579. Although the trial judge denied Meza's request, he remarked that, "I am reasonably certain ... that the State's not going to get a submission on an 'A' DWI [requiring proof of .15 BAC]." *Id.*

The next day at the charge conference, the trial judge had a change of heart, tendering a proposed jury charge that tracked the information and authorized Meza's conviction for Class A DWI, if jurors found beyond a reasonable doubt that his BAC was at least .15 or more at the time of

both his breath test and the offense. *Id.* at 580. At the charge conference, the trial judge pointed out that the information contained surplusage that was not required by the statute – "the requirement that [Meza's] BAC be .15 near *the time of the offense* rather than just *at the time of the time of the analysis of his breath.*" *Id.* (emphasis in original). The trial judge suggested that the State abandon this language in the information and remove it from the proposed charge, which would render the State's inability to conduct a retrograde extrapolation irrelevant. But, "The State declined to do so, *stating it was department policy* – in order to be fair to defendants – not to abandon surplusage language after trial has begun, *even when it increases the State's burden.*" *Id.* (emphasis added). The jury convicted Meza of Class A misdemeanor DWI as charged in the information. *Id.*

On appeal, Meza claimed that the evidence was legally insufficient to sustain his conviction because the State failed to elicit evidence from which a rational juror could have concluded beyond a reasonable doubt that his BAC was at least .15 at the time of the offense, given its failure

to introduce any evidence of retrograde extrapolation through its expert.[2] *Id.* at 582. The State argued that, even without evidence of retrograde extrapolation, the jury could have rationally found that Meza's BAC was at least .15 at the time of the offense. *Id.* at 582-84. Tellingly, the State did not argue[3] – as the trial judge had remarked at the charge conference – that the inclusion of the phrase "at or near the time of the offense" was surplusage that was not an element of the offense under the statute and so would not have been part of the hypothetically correct jury charge as set out in *Malik v. State*, 953 S.W.2d 234 (Tex.Crim.App. 1997).

In a published opinion, the court of appeals unanimously reversed Meza's conviction, entered an appellate acquittal for Class A DWI, and remanded the cause for a new trial for Class B DWI. The court rejected the State's argument that it was "imposing a *de facto* rule" that no

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[2] Although Meza did not expressly argue that the evidence was legally insufficient to prove beyond a reasonable doubt that his BAC was at least .15 at or near the time of the offense, the State nevertheless responded that Appellant challenged "whether the evidence was adequate to enable the jury to conclude beyond a reasonable doubt that appellant's BAC was at least 0.15 at or near the time that appellant committed DWI..." It also argued that "the jury could have rationally determined that appellant's BAC was at some quantity of .015 [sic] or greater at or around the time that appellant was last driving, just before the crash, even without retrograde-extrapolation testimony to identify what appellant's specific BAC was at that time." *Meza v. State*, 01-15-01050-CR, State's Brief 7-8, 18 (available at www.search.txcourts.gov).

[3] *See* n. 5, *infra.*

defendant could ever be convicted of Class A misdemeanor DWI without evidence of retrograde extrapolation. *Id.* at 586. The court rejected the State's argument that jurors could have "rationally inferred," "rationally concluded," or "rationally determined" that Meza's BAC was .15 or higher, at or near the time of the offense, 95 minutes before his breath test. *Id.* at 578. Speaking for the court, Chief Justice Radack wrote:

> We agree that all of these facts the State points to could be evidence in support of a Class B misdemeanor intoxication finding that a defendant has lost "the normal use of mental or physical faculties by reason of introduction of alcohol." TEX. PENAL CODE ANN. §§ 49.01(2), 49.04(a). But that is not the issue given the jury's finding in this case. *Here, the issue is whether these facts can support a finding that, beyond a reasonable doubt, appellant's BAC was higher than .15 "at or near the tine of the accident" in the face of the State's own expert witness's testimony that it would be speculation to infer that to be true.*[4]

Id. at 584 (emphasis added). Of equal, if not greater import, was the court of appeals' holding that, "It was the jury charge that the State requested in this case that imposed that requirement [that jurors had to find beyond a reasonable doubt that Appellant's BAC was at least .15 at or near the time of the offense] in this particular case." *Id.* Notably, the State did not

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[4] The court of appeals thoroughly distinguished the three cases the State cited to fortify its contention "that the jury could rationally infer from [the technical supervisor's] testimony and the rest of the evidence that, immediately before the wreck, appellant's BAC was at least .15." *Id.*

seek discretionary review of the court of appeals' published appellate acquittal.

Appellant's Trial and Appeal: The Sequels to Meza

Appellant was arrested on April 9, 2015 and charged with Class A DWI by having a BAC of at least .15 at the time of the breath test offense and at or near the time of the offense. CR 6; 2017 WL at *1. Three critical plot points that compelled the appellate acquittal in *Meza* also informed the narrative of this trial, conducted just six weeks after trial in *Meza*:

- an information that charged Appellant with Class A DWI by having a BAC of at least .15, at or near the time of both the test and the offense;
- a jury charge that required jurors to find beyond a reasonable doubt that Appellant had a BAC of at least .15, at or near the time of both the test and the offense; and
- a breath test technical supervisor, who could not conduct a proper retrograde extrapolation to shoulder the State's burden of proving beyond a reasonable doubt that Appellant's BAC was at least .15 at or near the time of the test and the offense.

Id. at *1-2.

At the charge conference, the State neither objected to the inclusion of this additional element in the charge nor argued to the trial judge that it was surplusage that could properly be abandoned in the information

and removed from the charge because it was not part of the hypothetically correct jury charge embodied in *Malik*. The jury was charged on both the Class A and lesser-included Class B misdemeanor offenses of DWI. The jury found Appellant's BAC was at least .15 at the time of the breath test and at or near the time of the offense, and convicted him of Class A DWI. *Id.* at *2.

On appeal, Appellant argued that, because the facts in his case were identical to *Meza*, its holding required an appellate acquittal on the Class A misdemeanor offense of DWI and a new trial on Class B DWI. In response, the State advanced the argument that it had inexplicably failed to urge in *Meza* – the phrase requiring jurors to find beyond a reasonable doubt that Appellant's BAC was at least .15 "at or near the time of the offense" was surplusage,[5] was not an element of Class A DWI, and would not have been included in the hypothetically correct jury charge of *Malik*.

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[5] The best the State could offer for not raising the *Malik* argument in *Meza* was that, "this argument was not made [by the State] or considered [by the court of appeals] in *Meza*, *perhaps because the prosecutor in that case was urged to remove the language and declined to do so.*" SB 20 (emphasis added)(citation omitted). To its credit, the State has not re-urged this quintessential example of Monday-morning quarter-backing in this Court. While it again posits that, "It is unclear why the First Court of Appeals did not apply the hypothetically correct jury charge in *Meza*," Brf. 18 n. 5, the only logical response is that court of appeals recognized, as it did here, that the State's deliberate assumption of this additional evidentiary burden took *Meza* out of the ambit of the holding in *Malik*.

The State also argued that the evidence was legally sufficient to sustain Appellant's conviction for Class A DWI, regardless of any reliable expert extrapolation testimony because the jury could have *reasonably inferred* that Appellant's BAC was .15 or higher "at or near the time of the offense" because a breath test conducted two hours after the stop was "at or near" the time of the stop. Appellant countered that the State was estopped from relying on *Malik* because it had willingly assumed this additional burden as a matter of the official policy of the Harris County District Attorney's Office. Appellant pointed out that the State could not satisfy that burden because a similar argument had been raised and rejected in *Meza*, even though the test in *Meza* was conducted thirty minutes earlier than the test in this case.

While conceding that its expert testimony was "similar to the testimony that *Meza* held insufficient," the State argued that *Meza* was distinguishable because that decision assessed the sufficiency of the evidence under the actual charge given to the jury rather than the hypothetically correct charge of *Malik*. 2017 WL at *3. A unanimous court of appeals reversed the conviction and entered an appellate acquittal for Class A DWI based on *Meza*. *Ramjattansingh v. State*, 530 S.W.3d at 265.

The court of appeals agreed that evidentiary sufficiency challenges are ordinarily measured under a hypothetically correct jury charge but held that in this case, the State invited error. *Id.* at 263. As the court opined:

> In its brief, the State acknowledges that it increased the burden of proof by adding the language as to [Appellant's] alcohol concentration at or near the time of the offense. *The State's deliberate decision to increase its burden at trial forecloses it from insisting on appeal that the sufficiency of the evidence must be measured under a hypothetically correct jury charge with a lesser burden.*
>
> The doctrine of invited error estops a party from asking for something, getting what it asked for, and then complaining about the outcome. The doctrine applies when the complaining party was the "moving factor" in creating the purported error it complains about. *In this instance, the higher burden about which the State complains would not have been included in the jury charge had the State not charged [Appellant] with having an alcohol concentration of 0.15 or more when he was behind the wheel.* We therefore reject the State's argument for review under a hypothetically correct jury charge because *it is an impermissible attempt to disown the higher burden of proof that appeared in the actual charge only as a result of the State's charging decision.* ...
>
> [I]n this case, the State did not merely acquiesce on an additional burden by failing to object to the charge; rather, the State affirmatively created the additional burden by the way in which it chose to charge [Appellant] in the information. *See Meza*, 497 S.W.3d 580, 586 (measuring evidentiary sufficiency under actual charge given to jury where information and charge requested by State imposed additional burden of proof).

Id. (emphasis added)(citations omitted).

While reaching the correct result, the court of appeals did not link its invited error holding to the State's admission in *Meza* that its charging decision was the official policy of the Harris County District Attorney's Office. As a result, the State argues that the court of appeals' "contention" that "the additional language in the charging instrument [sic] a 'deliberate decision [by the State] to increase its burden,' but nothing in *this* record supports that contention." Brf. 18 n. 6 (emphasis in original). The State argues that, regardless of whether its decision to include this language was deliberate or a mistake, the court erroneously held "for the first time" that the equitable doctrine of estoppel applies to the hypothetically correct jury charge in resolving claims of legal sufficiency. *Id.* at 18-19. As set forth below, the State's avowals are wide of the mark on multiple levels.

The Court of Appeals Correctly Applied the Doctrines Of Invited Error and Estoppel Against the State

"The doctrine of invited error is properly thought of, not as a species of waiver, but as estoppel. ... Just as the law of entrapment estops the State from making an offense of conduct that it induced, the law of invited error estops a party from making an appellate error of an action it induced." *Prystash v. State*, 3 S.W.3d 522, 431 (Tex.Crim.App. 1999); *see*

also Franks v. State, 961 S.W.2d 253, 255 (Tex.App.– Houston [1st Dist.] 1997, pet. ref'd)("It is a well-settled principle of law that [a party] cannot invite error and then complain of it... when [a party] is the 'moving factor' creating the error."). Estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)(citation omitted). Estoppel "protect[s] the integrity of the judicial process," by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," and to prevent the parties from "playing 'fast and loose' with the courts." *Id.* at 750 (citations omitted). One of the critical considerations in determining whether the doctrine of estoppel applies "is whether the party seeking to assert an inconsistent position would derive an unfair advantage..." *Schmidt v. State*, 278 S.W.3d 353, 358 n. 9 (Tex.Crim.App. 2009).

In the context of determining whether estoppel will preclude a party from complaining about charging error, the law is well settled that a party may not benefit from an error committed at his behest by complaining of a charge that he requested. *See e.g., Tucker v. State*, 771 S.W.2d 523, 534 (Tex.Crim.App. 1988). Estoppel will not apply where the record is silent

on the issue; "the mere absence of a showing of responsibility for the inclusion of [a] charge ... does not give rise to estoppel." *Trejo v. State*, 280 S.W.3d 258, 260 (Tex.Crim.App. 2009). But when, as here, the State "had some responsibility" for the charge, estoppel precludes it from complaining that the charge was erroneous. *Woodard v. State*, 322 S.W.3d 648, 659 (Tex.Crim.App. 2010)(where defendant "helped prepare the [erroneous] charge," and so "at the very least, [he] had some responsibility for the jury instruction" he was estopped from complaining about it on appeal).

Viewed through this lens, the court of appeals correctly applied these interlocking legal axioms of estoppel and invited error against the State. First, because the State had exclusive control over the manner in which the information was prepared, it was responsible for including the very language at trial it now seeks to distance itself from on appeal. Second, because the jury charge had to track the information the State prepared, its conscious decision to include the "at or near the time of the offense" language in the information, as a matter of fact, led to the inclusion of this language in the charge. Third, as the court of appeals correctly recognized in *Meza*, the State's decision to plead "at or near the time of the offense"

and willingly assume the burden of proving this fact beyond a reasonable doubt was not made by a rogue prosecutor, and was not a coincidence, one-off, or mistake: "it was department policy ... not to abandon surplusage language after trial has begun, even when it increases the State's burden." *Meza v. State*, 497 S.W.3d at 580.

This Court has consistently applied the doctrines of invited error and estoppel against defendants in cases involving claims of charge error. *See Woodard v. State*, 322 S.W.3d at 659; *Prystash v. State*, 3 S.W.3d at 431. Because a good rule "works both ways," *Montemayor v. State*, 543 S.W.2d 93, 99 (Tex.Crim.App. 1976)(Douglas, J., *dissenting*), and because, "at the very least, [the State] had some responsibility for the jury instruction" at issue, this Court should not second-guess the court of appeals' decision applying invited error and estoppel against the State. *See Arcila v. State*, 834 S.W.2d 357, 361 (Tex.Crim.App. 1992)(this Court's reversal of court of appeals "at least when the evidence is sufficient to support it ... only tends to undermine the respective roles of this and the intermediate courts without significant contribution to the criminal jurisprudence of the State.").

Contrary to the State's claim, this case was not the "first time" the

First Court of Appeals had applied the tenets of invited error and estoppel against the State where it sought to absolve itself of its conscious decision to file an information and request a charge imposing additional burden of proof upon it. Brf. 18. That is the essence of *Meza*, even though the court of appeals did not discuss *Malik* in *Meza*. Moreover, in *Rodriguez v. State*, 456 S.W.3d 271, 280 (Tex.App.– Houston [1st Dist.], 2014, pet. ref'd), the defendant claimed the trial court erred in abrogating his justification defense by including incorrect and confusing instructions on self-defense. Although the State argued the defendant was not entitled to this charge, the First Court of Appeals disagreed and reversed because the State "conducted itself as if it agreed that a fact question ... had been raised. ... Because the State conducted itself as it did, *it is estopped from reversing course now*." *Id.* (emphasis added). *Cf. Reed v. State*, 14 S.W.3d 438, 442 (Tex.App.– Houston [14th Dist.] 2000, pet. ref'd)(where State requested defendant undergo psychiatric examination, State was estopped from claiming on appeal that there was no evidence to show a bona fide doubt as to his competence); *Schmidt v. State*, 278 S.W.3d at 359 ("There is no prohibition on applying the rule of judicial estoppel against the State...").

Having unsuccessfully relied on *Leonard v. State*, 2016 WL 5342776

(Tex.App.– Houston [14th Dist.] 2016, pet. ref'd), in the court of appeals, the State's attempt to double down on it in this Court, Brf. 17 n. 4, fares no better. First, as an unpublished memorandum decision, *Leonard* is without precedential value under TEX.R.APP.P. 47.7(a). Second, *Leonard* is factually distinguishable as defense counsel expressly requested that the jury charge track the information and not the statute, as here, and the State agreed.[6] The court of appeals concluded the defendant "cannot take advantage of an error that he invited," applying estoppel and invited error as the court of appeals did in this case. *Id.* This twist takes the sufficiency analysis in *Leonard* out of the ambit of *Malik*, and the wind out of the State's sails in this Court.

This Court Can Properly Take Judicial Notice of the Decision in Meza

In his reply brief, Appellant requested that the court of appeals take judicial notice of its holding in *Meza* that it was the official policy of the

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[6] The court of appeals correctly distinguished *Leonard* because the "State had attempted to omit [the at or near the time of the offense] language from [the] jury charge and acquiesced in its inclusion in the charge only after [the] defendant objected that jury charge should include [the] same language as [the] information." *Ramjattansingh v. State*, 530 S.W.3d at 263-64. The State's reliance on *Leonard* is not just misplaced, it is ironic given the fact that counsel for the State is the "appellate attorney from the district attorney's office [called on] to opine on the issue" [who] "pointed out that the information in this case did not track the statute," the same defect in this case driven by its office policy. *Leonard v. State*, 2016 WL 5342776 at *5–6. ("MS. DAVIS [STATE]: ... I think that we'll withdraw our proposal and we'll accept [defense counsel's] at or near the time of the commission of the offense...").

Harris County District Attorney's Office to include the "at or near the time of the offense" language in the information and jury charge. Reply 6 n. 10. TEX.R.EVID. 201(b) provides that, "The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Accordingly, the court of appeals was properly permitted to take judicial notice of its holding in *Meza* that it was office policy not to abandon the very surplusage that increased its burden the State now seeks to disclaim. *See Jubert v. State*, 753 S.W.2d 458, 459 (Tex.App.–Texarkana 1988, no pet.)(appellate court permitted to take judicial notice of its own orders, records and judgments).

Rules 201(c)(1) & (2) provide, respectively, that the court "may take judicial notice on its own; or must take judicial notice if a party requests it and the court is suppled with the necessary information." Rule 201(d) mandates that, "The court may take judicial notice at any stage of the proceeding." While these provisions required the court of appeals to take judicial notice of its decision in *Meza*, it did not do so and, accordingly, it did not mention the official office policy of the District Attorney's Office in its opinion. But this gap on the canvas – one the State strenuously argues

requires reversal of the court of appeals' decision – is not fatal inasmuch as Rules 201(c) & (d) permit this Court to properly take judicial notice of this critical and unassailable fact. *See Granados v. State*, 843 S.W.2d 736, 738 (Tex.App. – Corpus Christi 1992, no pet.)("An appellate court may take judicial notice for the first time on appeal.").

To keep this Court from paying any attention to the court of appeals' decision in *Meza*, the State argues that Appellant "cites no authority that allows an appellate court to take judicial notice of comments made by a party in a reporter's record from a separate case in order to find invited error in the present case." Brf. 20. This assertion is derailed by case law the State is unwilling or unable to acknowledge. First, it does not discuss or distinguish *Jubert* even though Appellant cited it in his reply brief. Moreover, its avowal does not withstand this Court's decision in *Mata v. State*, 46 S.W.3d 902, 910 (Tex.Crim.App. 2001), that an appellate court may take judicial notice of scientific literature not presented by either party at trial or on appeal, or *Griego v. State*, 457 S.W.3d 134, 142 n. 5 (Tex.App.– Houston [1st Dist.] 2014), *rev'd on other grounds*, 467 S.W.3d 508 (Tex.Crim.App. 2015), that an appellate court may properly take judicial notice of information available on various websites, including

government websites. If this Court can take judicial notice of information on any website, the idea that it may not take judicial notice of facts within a opinion issued by an appellate court, especially in a published opinion, is risible. Because this Court, like the court of appeals, was free to take judicial notice of the office policy that drove the State's charging decision and, ultimately, the decision in *Meza*, the State's claim fails.

The State's reliance on *Turner v. State*, 733 S.W.2d 218, 222 (Tex.Crim.App. 1987), and *Garza v. State*, 996 S.W.2d 276, 279-80 (Tex.App.– Dallas 1999, pet. ref'd), Brf. 20, is unwarranted. In *Turner*, this Court spoke merely of the "general rule" that a court could not look outside the record of its own case, relying on non-binding Texas civil cases, non-binding authority from other states, and the consummate secondary authority, Corpus Juris Secundum, to fortify its holding. Moreover, the State fails to acknowledge that, because *Turner* pre-dated the advent of the Rules of Evidence, *id.* at 222-23, its holding is of limited, if not, zero precedential value. In *Garza*, the court of appeals held that the trial court could not take judicial notice of statements made under oath by a witness made at the trial of a co-defendant. By contrast, the fact subject to judicial notice in this matter was not made by a witness but an officer of the court

whose "representations are entitled to great deference." *White v. Reiter*, 640 S.W.2d 586, 599 (Tex.Crim.App. 1982). Moreover, because the official policy in *Meza* was a statement made by the prosecutor in open court, on the record, and undisputed by defense counsel, this Court must accept it as true. As this Court opined in *Yarborough v. State*, 947 S.W.3d 892, 895 (Tex.Crim.App. 1997), "A counsel's statement about an occurrence in the courtroom, which was made for the purposes of the record, recorded by the court reporter, undisputed by the opposing counsel, and unquestioned and unqualified by the judge in whose presence the statement was made, establishes the occurrence for purposes of the appellate record."

Malik is Not the Wonder Drug the State Makes it Out to Be

Shorn of the evanescent claim that it was the victim of invited error and estoppel, all the State can muster is the equally unheralded claim that *Malik* is an all-powerful, impenetrable force field through which even the most meritorious sufficiency claims shall pass. Brf. 12-17. But its argument that *Malik* is a wonder drug that cures whatever ails the State[7] is unsupported by the authority it cites.

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[7] To paraphrase a former judge on this Court, with a nod to noted legal sage Chris Rock, *Malik* "is not like Robitussin, you can't put it on every injury and expect a cure." *Montanez v. State*, 195 S.W.3d 101, 110 (Tex.Crim.App. 2006)(Meyers, J., *dissenting*).

At the outset, in none of the cases the State cites, unlike the present case, did the State deliberately assume an additional evidentiary burden.[8] But, beyond this critical distinction, the State's deliberate inclusion of the critical language in the charge creating a higher burden was not the "little mistake" this Court found tolerable in *Johnson v. State*, 364 S.W.3d 292, 295 (Tex.Crim.App. 2012). Neither was the deliberate inclusion of this language the result of oversight or judicial error that gave Appellant an unwarranted appellate acquittal, the vices *Malik* was designed to prevent. *Malik v. State*, 953 S.W.2d at 239 (*Malik* designed to ensure "the greatest form of relief in the criminal system – an acquittal – to be granted because the defendant received a windfall in the jury instructions."). Moreover, the State's claim that the inclusion of the language "at or near the time of the offense" was an immaterial variance that did not prejudice Appellant's substantial rights, Brf. 12-14, proves too much. Its deliberate decision to charge Appellant with having a BAC of at least .15 at or near the time of the offense necessarily led him to believe he would have to defend against

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[8] In its merits brief, the State rounds up the usual surplusage suspects it did in its petition for discretionary review, adding only this Court's recent decision in *Hernandez v. State*, ___ S.W.3d ___, 2017 WL 4675371 (Tex.Crim.App. Oct. 18, 2017) to the mix. Brf. 9 *et seq.* But because the State did not willingly take on an additional evidentiary burden in *Hernandez* as it did in this case, its holding does nothing to advance the State's argument.

this discrete allegation, and to formulate a trial strategy that would allow him to prepare an adequate defense, one of the hallmarks in determining whether Appellant's substantial rights were prejudiced, as the State's own authority makes manifest. Brf. 12, citing *Gollihar v. State*, 46 S.W.3d 243, 258 (Tex.Crim.App. 2001)("[D]id the indictment inform appellant of the charge against him sufficiently to allow him to prepare an adequate defense at trial...?").

That *Malik* is not nearly as all-powerful as the State would have this Court believe is also fortified by this Court's decision in *Planter v. State*, 9 S.W.3d 156 (Tex.Crim.App. 1999). In *Planter*, the State alleged, and the jury was charged to convict if it found that the defendant "requested, commanded and attempted to induce Lex Baquer to engage in specific conduct, namely, to kill [the victim]." *Id.* at 158. The defendant argued that the evidence was legally insufficient to sustain his capital murder conviction because there was nothing in the record that showed he had requested "to kill" the victim. *Id.* While the court of appeals agreed that no such evidence existed, it found there was evidence that the defendant was a party to the offense. *Id.* While there was an abstract instruction in the jury charge on the law of parties, there was no application paragraph

authorizing conviction on this theory. *Id.* Relying on *Malik*, the court of appeals held that because a hypothetically-correct jury charge would have applied the law of parties to the facts of the case, the evidence was legally sufficient to sustain the conviction. *Id.* This Court concluded that not even the hypothetically-correct jury charge in *Malik* could support the great weight rested upon it by the court of appeals, and ordered an appellate acquittal:

> The evidence introduced at trial by the state proved an offense different from the offense alleged in the indictment and set out in the jury charge and is therefore insufficient to show that appellant is guilty, as either the primary actor or as a party, of the conduct alleged by the state. Appellant was never charged with or indicted for the offense that the evidence appears to support: capital murder by soliciting Bacquer to hire appellant to kill [the victim]. *The evidence presented at trial does not comport with the conduct alleged in the indictment and set out in the jury charge, and the jury verdict cannot, therefore, be supported by either the actual jury charge or the hypothetically-correct jury charge that was formulated by the Court of Appeals.*

Id. at 159 (footnotes omitted)(emphasis added).

This Court's reasoning and analysis in *Planter* forecloses the State's reliance on *Malik*. As in *Planter*, the evidence presented at trial – that Appellant's BAC at or near the time of the test was at least .15 – did not comport with the conduct alleged in the indictment and set out in the jury

charge – that Appellant's BAC at or near the time of the offense was at least .15. Accordingly, as in *Planter*, because the jury's verdict cannot be supported by either the actual jury charge or by the hypothetically-correct jury charge in *Malik*,[9] the State's ground for review is without merit.

APPELLANT'S REPLY TO THE STATE'S SECOND GROUND

"It's deja-vu all over again."
New York Yankee Hall of Famer Lawrence "Yogi" Berra

The State's "Thirteenth Juror" Claim is Foreclosed by Meza

The State asserts that, because the court of appeals "usurped the jury's role..., this case could serve [sic] an important precedent as a reminder that appellate courts do not sit as the thirteenth juror." Brf. 29. The State's ploy playing the "thirteenth juror" card – widely viewed to be a third rail in our criminal justice system – and undoubtedly instrumental in getting review granted, achieves no greater cachet by its repetition in the State's merits brief. First, this assertion impermissibly truncates the standard of review that drives sufficiency challenges.[10] Second, it ignores

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[9] Although Appellant relied on *Planter* at oral argument and in his post-submission letter of authority, the State neither discussed nor distinguished it in its petition for discretionary review or in its merits brief.

[10] Ignoring the controlling authority cited in the text that provides context and meaning to this standard, the State reduces this standard to a single sentence culled from *Jackson v. Virginia*.

controlling case law holding that the bedrock protection of proof beyond a reasonable doubt trumps even a boilerplate "thirteenth-juror" claim. Third, the very argument raised in this ground for review was rejected in *Meza*, a decision the State labors mightily, albeit unconvincingly, to convince this Court to ignore.

The Standard of Review: Legal Sufficiency Challenges

While the standard of review informing the resolution of a challenge to the sufficiency of the evidence is deferential, it does not insulate a jury verdict from meaningful appellate review. *See e.g., Williams v. State*, 235 S.W.3d 742, 769 (Tex.Crim.App. 2007)(sustaining claim that evidence was legally insufficient to support jury's verdict); *Gross v. State*, 380 S.W.3d 181, 189 (Tex.Crim.App. 2012)(same); *Britain v. State*, 412 S.W.3d 518, 523 (Tex.Crim.App. 2013)(same); *Winfrey v. State*, 393 S.W.3d 763, 774 (Tex.Crim.App. 2013)(same).

Federal due process requires that the State prove every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979). When reviewing the sufficiency of the evidence to

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Brf. 22-23.

support a conviction, this Court considers all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* at 319. In assessing the legal sufficiency of the evidence, this Court must "ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Williams v. State*, 235 S.W.3d at 750.

In carrying out its responsibility to assess the sufficiency of the evidence, a reviewing court must remain cognizant that "proof beyond a reasonable doubt" means "proof to a high degree of certainty." *Lane v. State*, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted). If, based on all the evidence, and viewed in the light most favorable to the verdicts, a rational jury must necessarily have entertained a reasonable doubt as to Appellant's guilt, due process requires an appellate acquittal. *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex.Crim.App. 2003). "If the evidence at trial raised only a suspicion of guilt, even a strong one, then that evidence is insufficient." *Herrin v. State*, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002). The sufficiency of the evidence under the *Jackson* standard is a question of law which this Court reviews *de novo*. *Matson*

v. State, 819 S.W.2d 839, 846 (Tex.Crim.App. 1991).

The standard of proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure, because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. at 315 (citation omitted). By impressing upon the fact finder the need to reach a subjective state of near certitude of the accused, this standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.* *See also United States v. Crain*, 33 F.3d 480, 487 (5th Cir. 1994) ("Although the strict nature of [the *Jackson*] standard demonstrates our reluctance to interfere with jury verdicts, this case is an example of why courts of appeals must not completely abdicate responsibility for reviewing jury verdicts."). The Supreme Court has stressed that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 317. As noted below, the court of appeals correctly concluded that this is just such a case.

The Identical Argument the State Raises in this Court Was Raised and Rejected by the Court of Appeals in Meza

The very argument in the State's second ground – the evidence was legally sufficient to sustain Appellant's conviction for Class A DWI – was rejected by the court of appeals in *Meza*. As the State there argued:

> But even without providing the jury with appellant's exact BAC when appellant was driving, [the technical supervisor] sufficiently described the 3-step absorption, plateau or "peak [,]" and elimination phases of alcohol intoxication to enable the jury to *rationally infer* from her testimony and the rest of the evidence that appellant's BAC was at some quantity equal to or greater than 0.15, and may even have been higher than 0.176, at that time. ...
>
> Here, akin to *Stewart*,[11] the jury was not required to calculate or know appellant's exact BAC at the time he committed DWI to find appellant guilty of Class A misdemeanor DWI. ... And, just as in Stewart, appellant's jury could have *rationally reached that conclusion* by considering not only appellant's breath-test results, but also the other evidence concerning appellant's high level of intoxication, without "wildly speculating" or otherwise deciding appellant's guilt based on facts not in evidence. The jury's conduct in evaluating the totality of the evidence and *making an inference*, based on that evidence, regarding that essential element of the case was a routine exercise of the jury's prerogative to make reasonable, record-supported deductions from the facts and evidence when deliberating ...

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[11] *Stewart v. State*, 129 S.W.3d 93 (Tex.Crim.App. 2004), one of the three relied upon by the State, but distinguished by the court of appeals.

> As in *Stewart*, and based on the totality of the testimony and evidence developed at trial, including appellant's breath-test results, *the jury could have rationally determined that appellant's BAC was at some quantity of .015 or greater at or around the time that appellant was last driving*, just before the crash, even without retrograde-extrapolation testimony to identify what appellant's specific BAC was at that time.

SB[12] 13, 17-18 (emphasis added)(citations omitted).

The court of appeals rejected the State's argument that the jury could have "rationally inferred," "rationally concluded," or "rationally determined" that the defendant's BAC was .15 or higher, at or near the time of the offense, 95 minutes before his breath test. *Meza v. State*, 497 S.W.3d at 578. Speaking for the court, Chief Justice Radack wrote:

> We agree that all of these facts the State points to could be evidence in support of a Class B misdemeanor intoxication finding that a defendant has lost "the normal use of mental or physical faculties by reason of introduction of alcohol." TEX. PENAL CODE ANN. §§ 49.01(2), 49.04(a). But that is not the issue given the jury's finding in this case. *Here, the issue is whether these facts can support a finding that, beyond a reasonable doubt, appellant's BAC was higher than .15 "at or near the tine of the accident" in the face of the State's own expert witness's testimony that it would be speculation to infer that to be true.*[13]

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[12] *Meza v. State*, 01-15-01050-CR (State's Brief)(available at www.search.txcourts.gov).

[13] The court of appeals thoroughly distinguished the three cases the State cited to fortify its contention "that the jury could rationally infer from [the technical supervisor's] testimony and the rest of the evidence that, immediately before the wreck, appellant's BAC was at least .15." *Id.*

Meza v. State, 497 S.W.3d at 584 (emphasis added).

Undaunted by the court of appeals' rejection of its sufficiency argument, the State re-urges it in this Court. Rather than acknowledge the inconvenient truth that *Meza* forecloses its claim, not surprisingly, the State flips the script, directing the conversation away from *Meza*, urging this Court to apply the dictionary definition of "near."[14] Brf. 24. That this term is not part of the statute, and thus not defined in the statute, and, more importantly, is no longer employed by the Harris County District Attorney's Office in its charging decisions, is the best evidence that the State's argument is a non-starter.

Although the State reprises the argument that "jurors were free to assign [near] its plain and ordinary meaning," Brf. 24 (citation omitted), as some indication that the court of appeals' rejection of its claim was wide of the mark, it declines to recognize that the court of appeals agreed with it. Even when viewed through the lens of the very definition[15] the State

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[14] The State sought to adorn this argument in the court of appeals with *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984). SB 14. To its credit, the State has abandoned its reliance on this Reagan-era, Fifth Circuit decision essentially apropos of nothing.

[15] "A relatively short distance in space, time, degree."

asked the court of appeals to embrace, the court concluded:

> The State concedes that the interval between the offense and [Appellant's] breath test was around two hours. Given the impact that the passage of time has on a defendant's alcohol concentration, a two-hour interval is not close enough in time to an alleged instance of drunk driving to qualify as *near* the time of the offense, at least not on this record. ... [The State's expert] even conceded that [Appellant's] alcohol concentration could have been below the legal limit of .08 when he was on the road. When viewed in the light most favorable to the verdict, this uncertain evidence was not sufficient to find beyond a reasonable doubt that [Appellant's] alcohol concentration was 0.15 or more near the time of the offense.

Ramjattansingh v. State, 530 S.W.3d at 264 (emphasis in original).

The State may disagree with this analysis, but it does not, because it cannot, favor this Court with any legal authority holding that whatever "plain and ordinary meaning" jurors may have elected to afford the term "near" takes this case out of the ambit of the holding in *Meza*. In *Meza*, the court of appeals held that a breath test conducted 95 minutes after the offense was not "near" the time of the offense and the State did not seek discretionary review. While it may now have buyer's remorse for failing to do so, that does not change the focal point of this proceeding, one that the State refuses to acknowledge: the length of time between Appellant's breath test and the stop was some two hours – a full 33% longer than the

interval in *Meza*. All the State offers to counter this stubborn fact is its bold assertions that, "It is reasonable to conclude that two hours is a short distance in time, or otherwise *near* the time of the offense," Brf. 24 (emphasis in original), and, "No extrapolation evidence is needed to prove the term near." *Id.* But neither pronouncement supports the great weight rested upon either of them. Because the former claim is, at bottom, rank speculation, this Court is not free to consider it. *See Franklin v. State*, 693 S.W.2d 420, 431 (Tex.Crim.App. 1985)(mere assertions in appellate brief unsupported by evidence will not be considered on appeal). Because the latter is unadorned by legal authority, it, too, presents nothing for review. *See Vuong v. State*, 830 S.W.2d 929, 940 (Tex.Crim.App. 1992)(where appealing party cites no legal authority to support her contention, it is inadequately briefed and appellate court will not consider it).

For these reasons, the State's second ground for review is without merit and should be overruled.

PRAYER FOR RELIEF

For all of these reasons, Appellant prays that this Court overrule the State's grounds for review and affirm the judgment of the First Court of Appeals.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

Pursuant to TEX.R.APP.P. 9.5(d), this reply was served on opposing counsel, by e-filing on December 26, 2017.

/s/ BRIAN W. WICE

BRIAN W. WICE

CERTIFICATE OF COMPLIANCE

Pursuant to TEX.R.APP.P. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of TEX.R.APP.P. 9.4(i)(2)(D):

Exclusive of the exempted portions set out in TEX.R.APP.P. 9.4(i)(1), this document contains 7302 words, and was prepared in proportionally spaced typeface using Word Perfect 8.0 in Century 14 for text and Times New Roman 12 for footnotes.

/s/ BRIAN W. WICE

BRIAN W. WICE